

No. 12278.

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT.

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LESTER W. HURLEY, APPELLANT,  
VS.  
SOUTHERN CALIFORNIA EDISON CO., LTD.,  
APPELLEE.

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REPLY BRIEF ON BEHALF OF APPELLANT.

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## SUBJECT INDEX

PAGE

Division One—Reply to Brief of Appellee .....	1-15
I. The Defense of Payment to Price on Alleged Valid Assignments Pleaded and Litigated Throughout the Trial Presupposed Termination of Joint Tenancy and Precluded Reliance Thereon .....	1-4
II. The Findings of the Trial Court Establish That Defendant Had Knowledge, Both Actual and Constructive, of Fraud .....	4-10
III. Dividends and Stock Rights, When Declared and Set Aside Are Severed and Constitute a Trust Fund Held by the Company for the Benefit of Each Stockholder As an Individual....	10-11
IV. The Dividends and Stock Rights, When Set Aside, Constituted a Special Deposit in the Hands of Defendant for the Benefit of the Plaintiff .....	11
V. Plaintiff Is Entitled to Interest from the Date Each Dividend Was Declared, and Not from the Date of Demand .....	11-12
VI. Conclusion of Law XI (T. R. p. 62) Is Erroneous ..	12-15
Division Two .....	16-19
I. Conclusions of Law V, VI, VII, VIII and IX Are Correct .....	16
Conclusion .....	19-20

## CASES CITED

Bank of Guntersville vs. U. S. Fidelity, etc., Co., 201 Ala. 19, 75 So. 168 .....	18
Calistoga Nat'l vs. Calistoga Vineyard, 7 Cal. App. 2d 65, 72, 46 Pac. 2d 246 .....	19
Estate of Zaring, 93 A. C. A. 717, 209 Pac. 2d 642.....	10
Fish vs. Security First National Bank, 31 Calif. 2d 378, 89 Pac. 2d 10.....	10
Fuqua vs. Sholem, 60 Ill. App. 140 .....	17
Hansen vs. Bear Film Co., 28 A. C. 173, 1. c. 197.....	19
Haynes vs. Thomas G. Slack, 32 Miss. 193.....	17
Lee vs. Hibernia Savings Society, 177 Calif. 656, 171 Pac. 677.....	9
McDermot vs. Hays, 175 Cal. 95, 114, 118, 70 Pac. 616..	19
Miles vs. Bank of America, etc., 17 Cal. App. 2d 397-8, 62 Pac. 2d 177.....	19
Neff vs. New York Life Ins. Co., (April 26, 1946) 74 A. C. A. 208, 215.....	19
Perkins vs. Benquet Consolidated Mining Co., 55 Cal. App. 2d 720, 132 Pac. 2d 70.....	14
Ralph vs. Ball, 100 Kan. 460.....	16
Swanburg vs. Fossen, 43 L. R. A. 427, 433.....	17
Wells vs. Green Bay Co., 90 Wisc. 1. c. 453.....	19
Williams vs. Leon T. Shettler Co., 98 Calif. App. 282, 276 Pac. 1065 .....	9

## STATUTES AND TEXTS CITED

Section 1475, California Civil Code 4, 7, 12, 13, 14, 18, 19, 20	
Section 2413, Corporation Code of California.....	9
Section 33, California Civil Code.....	12, 17, 18, 20
43 C. J. S., p. 130, Sec. 53.....	17
31 C. J. 1002.....	17

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DIVISION ONE.

I.

The defense of payment to Price on alleged valid assignments pleaded and litigated throughout the trial pre-supposed termination of joint tenancy and precluded reliance thereon.

Appellee's claim that the defense of payment to one of several joint tenants was raised and litigated throughout the trial, finds no support in the record. The fact that such a defense, which now constitutes defendant's only defense, is not mentioned in defendant's answer or supplemental answer should be conclusive. It is true that plaintiff alleged that all stock in plaintiff's petition de-

scribed was issued to Lester Hurley, Elizabeth J. Price and George E. Burton, with full right of survivorship (T. R. p. 3); that 1/3 of all dividends and stock rights paid to Elizabeth J. Price were due and owing to plaintiff herein (T. R. p. 10).

However, no allegation appears in plaintiff's petition, or in defendant's answer or supplemental answer that the dividends or stock rights, for which this suit was brought, were issued to or payable to the plaintiff as a joint tenant of Price. On the contrary, plaintiff alleged that said dividends and stock rights were due and payable to the plaintiff.

Therefore, defendant's assertion that "plaintiff alleged his original tenancy interest, which defendant admitted" (Appellee's Brief, p. 4) discloses the complete absence of the defense and issue now relied upon. The allegation and admission by defendant of joint tenancy in stock could in no way raise the issue of joint tenancy in dividends and stock rights, or that the payment to Price of said dividends and stock rights constituted a payment to Price as a joint tenant of Hurley, who defendant "believed" had ceased to be a joint tenant.

If it had been the desire of the defendant to rely on the defense that the dividends and stock rights were due to Hurley as a joint tenant of Price, this allegation would of necessity appear affirmatively in defendant's answer. Further, the allegation "that defendant denies that said dividends and stock rights or either of them were or are owing to the plaintiff" (T. R. p. 22) would not have appeared. This allegation cannot be construed as an admission by defendant that it recognized the existence of any interest in Hurley, joint or otherwise.

The entire record, as well as the pleadings, disclose that it was not even intended by defendant to allege or rely on the defense that the dividends and stock rights were due and owing to Hurley as a joint tenant of Price. The entire defense was predicated on the theory that all payments were made to Price to the exclusion of Hurley for the reason that Hurley had assigned his entire interest

to Price, and his name as a stockholder had been removed from the books of the Company accordingly.

In support of this defense that Hurley had no interest—joint or otherwise—defendant brought forward the forged and void powers of attorney assigning said stock and void dividend orders to prove and justify defendant's exclusion of Hurley from any interest in all dividend and stock rights. When defendant was confronted with the fact that the dividend order and assignments embracing the power of attorney were void as attempted delegations of power by a minor, and further that said "documents" were forgeries, obtained by fraud and deceit, the defendant presented extensive expert testimony in an effort to prove the genuineness of the signatures to said powers of attorney, and attempted to establish the validity of the dividend orders.

That this was defendant's position and the defense relied upon stands admitted by appellee in its brief at page 6 thereof:

"The simple and admitted facts are that the defendant did make payments to one of several joint tenants believing that said joint tenant had, by properly executed documents, obtained the exclusive right to the payments and distribution made."

On this admission the question arises how defendant could believe it was making or intended to make payments to Hurley as a joint tenant of Price, when it believed Hurley had "by properly executed documents" parted with his entire interest and vested "the exclusive right to the payments" in Price, and that Hurley had therefore ceased to be a joint tenant?

Now under such an admission can it be doubted that defendant knew and intended that the payments so made to Price were made to the exclusion of Hurley, and were made without any expectation or thought that Hurley would share therein, or that Price in accepting said payments would "hold the proceeds as trustee or agent" for Hurley?



It follows that defendant is now in a position of asserting that it raised an issue and predicated its defense (now its only defense) on a state of facts that it "believed" did not exist, namely, that plaintiff remained a joint tenant with Price in the dividends and stock rights, although Hurley had "properly executed documents" that defendant "believed" conveyed all of Hurley's interest to Price.

Now aside from this absurd position now admitted by appellee, the pretrial stipulation entered in this case disproves defendant's present defense and constitutes a complete refutation and answer to the application of Section 1475 of the California Civil Code to this case.

The pretrial stipulation states that payments were made to Price (not as a joint tenant of Hurley) but "under Dividend Order No. 13157." This Dividend Order was not signed by Hurley, although if defendant considered Hurley a joint tenant, his signature would have been required (T. R. p. 26). This stipulation further provided that payments were made to Price "upon the authority of and in pursuance of Dividend Order 12743" (T. R. p. 27).

Certainly under such a stipulation defendant is estopped and cannot now be heard to say that payment was made to Price *not* "upon the authority of and in pursuance of Dividend Order 12743," and Dividend Order No. 13157, but that said payments were made to Price as a joint tenant of Hurley upon the authority of, and in pursuance of Section 1475, Civil Code.

Payment under Dividend Orders presupposes the non-existence of a joint tenant relation, while payment under Section 1475 of the Civil Code presupposes the existence of a joint tenant relation. Pleading the one defense, without more, precludes the other.

## II.

**The findings of the trial court establish that defendant had knowledge, both actual and constructive of fraud.**

In considering this point the court will note that the defendant relies exclusively on the trial court's Finding



XXVII (T. R. p. 57) wherein the court found defendant had no actual knowledge of the fraud perpetrated upon plaintiff by his grandmother.

This finding which is in the nature of a negative conclusion of fact must be considered in connection with all other findings made by the court touching fraud. It will be further remembered that this finding is specifically limited in two respects. First, to actual knowledge of the fraud perpetrated by the grandmother which, as the findings show, was not the only fraud involved. Second, it in no manner covers constructive knowledge of fraud.

### **Actual Knowledge of Fraud.**

The record shows specific findings of fact which establish actual knowledge of fraud on the part of the defendant, and these specific findings of fact cannot be nullified or eliminated by a conclusion of fact that no knowledge existed.

We direct the court's attention to the following findings:

1. Alteration of powers of attorney purportedly executed to assign the 575 shares of stock, which alteration was made after "documents" were executed by the plaintiff and said alteration was at the defendant's suggestion (Finding IX, T. R. pp. 41, 42). The defendant transferred plaintiff's stock upon authority of these altered assignments. This was action by the defendant on "documents," which defendant knew had been so altered as to render them void. These documents so altered with defendant's knowledge were part of the means used by plaintiff's grandmother to perpetrate the fraud against the plaintiff.
2. All stock certificates were issued in the name of Lester Hurley (Findings III, IV, T. R. p. 36). Powers of attorney purporting to assign said stock were executed by Lester W. Hurley (T. R. pp. 26, 58). These assignments were *not properly endorsed as-*

*signments* of which fact the defendant had actual knowledge, as it had all the record before it. This fact was found by the Kansas Court and by the lower court Finding XVI, Exhibit "D" incorporated by reference (T. R. pp. 49, 87). To transfer plaintiff's stock on defendant's books on improperly endorsed assignments was a fraud on the plaintiff, and a violation of the duty defendant owed the plaintiff.

3. The defendant was fully aware, and had direct knowledge of the great reluctance on the part of plaintiff's grandmother to furnish a guarantee of Hurley's signature on these assignments, and the repeated effort made to secure the transfer of said stock without such a guarantee (Finding IX, T. R. p. 41). This involves a specific finding of fact that shows direct knowledge on the part of defendant of action by Price that was part and parcel of the fraud committed.
4. The record shows that defendant had knowledge of, and was fully aware that plaintiff was being excluded from any benefit in the dividends and stock rights when it made payment to Price. This constituted actual knowledge of the fraud of exclusion perpetrated by Price against the plaintiff.
5. In Finding of Fact XXVIII (T. R. p. 57) it is specifically established that the defendant's resolutions passed January 25, 1929, before any stock rights were delivered to Elizabeth J. Price required that all stock rights be represented by warrants issued in the name of the stock holders (which included Hurley) "assignable by endorsement and delivery."

No warrants were issued that included plaintiff's name, and no warrants were delivered to him or endorsed and delivered by him. Since defendant admits that said dividends were paid and said stock rights delivered, upon the authority of, and in pursuance of Dividend Orders 12743 and 13157, it follows that they could not have been

delivered in pursuance of, or upon the authority of, endorsed warrants, as required by said resolution.

This action of the defendant was a violation of defendant's own resolution, and a fraud on the plaintiff, as well as a flagrant violation of his rights, of which defendant not only had actual knowledge, but which was perpetrated by the defendant outside of, above, and beyond the fraud of Elizabeth J. Price, herself.

We submit that this action alone eliminates any possible application of Section 1475 of the Civil Code. Further, that these specific findings of fact completely nullifies the negative conclusion of fact stated in Finding XXVII (T. R. p. 57).

### **Constructive Knowledge.**

It stands established by the findings and judgment in the Kansas case, as well as in this case, that the purported signatures of Lester W. Hurley appearing on the powers of attorney assigning said 575 shares of stock are forgeries (Finding XVI, Exhibit "D," and XVII, T. R. pp. 49, 50, 58, 87). This judgment is final, as no cross appeal has been taken from the trial court's decision on this point.

It shows that the transfer of said shares out of plaintiff's name and the subsequent payment of all dividends and stock rights to Price was based on forgeries in the hands of the defendant. Further, that the law charges the defendant with the inescapable duty to *know* whether such assignments are genuine or spurious and no amount of good faith will relieve it from that duty.

Here again, the defendant has been unable or unwilling to meet this issue, but has disregarded all authorities cited on the point in Appellant's Brief (pp. 40-48). Defendant again relies on Finding XXVII, which defendant attempts to construe as a finding of no actual or constructive knowledge of fraud. This conclusion of fact shows on its face that it is specifically limited to actual knowledge of fraud perpetrated by Price against plaintiff.

However, on the question of constructive knowledge of fraud, since it is an established fact that said instru-

ments were forgeries, and were acted upon by defendant, Conclusion of Fact XXVII cannot eliminate the effect thereof. The law is definitely settled that a corporation is bound to know the signatures of its stockholders. It is bound to know a spurious signature when presented to it for the purpose of securing a transfer of stock. Although a corporation cannot always have actual knowledge of the genuineness of a signature on assignments, nevertheless it is charged with knowledge as to the nature of said signature on stock assignments, regardless of innocence, mistake or lack of actual knowledge, and it is for this reason that such signatures are always required to be guaranteed for its own protection.

It follows that the forgeries gave notice and constructive knowledge of fraud to defendant *ab initio*, and the Conclusion of Fact XXVII, no matter how construed, constitutes no answer to the forgery found and the law applicable thereto.

Finding of Fact XIV (T. R. p. 45) Stipulation, Paragraph 5 (T. R. p. 29), Finding XXVI (T. R. p. 56), established that plaintiff was a minor at the time of purported powers of attorney and Dividend Orders were executed by him. Plaintiff was born December 18, 1908, and was therefore 19 years of age when the Dividend Orders were received by the company on December 11, 1928. He was 20 years of age when the forged powers of attorney of assignment were executed, in January of 1929 (Finding IX, T. R. p. 41).

The procural of these documents by Price from this minor plaintiff constituted a fraud upon him. These "documents" and all of them were void as an attempted delegation of power, both under the California law and the Missouri law as established by authorities cited in Appellant's Brief, page 63.

In the first Findings of Fact entered by the trial court, the court found "Dividend Orders Nos. 12742 and 12743 constituted attempted delegations of power by minor, which are declared void by statute of California. Such actions of minor are also held void *ab initio* under the law

of Missouri." The present Conclusion of Law V (T. R. p. 60) holds said orders to be voidable.

However, since plaintiff was a minor, 19 years of age, when the Dividend Orders were executed, and said instruments were at least avoidable, and therefore subject to disaffirmance within a reasonable time after plaintiff reached his majority, they were ineffective to bind the plaintiff, and constituted a fraud against the plaintiff. To protect the minor from such fraud, avoidance by the minor is always permitted.

Now since defendant was bound under the law to know plaintiff was a minor, at the time said instruments were executed, it had constructive knowledge of the fact that the property rights of the minor plaintiff were being illegally affected, violated, and a fraud worked upon him by the use of these illegal and void instruments. *Williams v. Leon T. Shettler Co.*, 98 Calif. App. 282, 276 Pac. 1065; *Lee v. Hibernia Savings Society*, 177 Calif. 656, 171 Pac. 677.

This constructive knowledge of the illegality with which the defendant was charged as a matter of law in dealing with this minor could never be wiped out or nullified, regardless of the rules relative to disaffirmance. On the question of knowledge of fraud, all questions concerning disaffirmance are immaterial. The knowledge thus secured by the defendant as to the attempted perpetration of fraud on this minor would continue and be binding upon defendant at all times thereafter.

In fact, the Section 2413 of the Corporation Code of California referred to by defendant as having been adopted in 1931, after defendant became charged with knowledge of illegality and fraud involved in the instruments under which it purported to act, could in no manner relieve the defendant of the knowledge of fraud previously acquired. In fact, this section of the statute indicates an attempt to modify the previous existing rule that a corporation was constructively bound and charged with knowledge of fraud tainting instruments executed by a minor.

It follows that by reason of the minority of the plaintiff in 1928 and 1929, when all of these instruments were



executed, and acted upon by the defendant, the defendant became charged as a matter of law with knowledge as to the fraud involved therein, and nothing that thereafter occurred could wipe out said knowledge so as to enable the defendant to say that it made payment to one of several joint tenants without knowledge, actual or constructive of the fraud perpetrated by Price against said minor plaintiff. Further, it cannot be heard to say that it had no knowledge of the fraud perpetrated against the minor plaintiff by the violation of its own resolutions.

### III.

**Dividends and stock rights when declared and set aside are severed and constitute a trust fund held by the company for the benefit of each stockholder as an individual.**

Defendant while admitting that dividends on stock exist separate and apart from the stock, and that stockholders rights therein are "distinct from their rights as stockholders" makes the inconsistent statement that such rights are still governed and controlled by their rights as stockholders.

To support this position, reliance is placed on *Estate of Zaring*, 93 A. C. A. 717, 209 Pac. 2d 642. In this case the proceeds of the sale of the corpus of the joint tenancy property is held to retain its joint tenancy status. What has been said in Appellant's Brief at page 34, relative to the case of *Fish v. Security First National Bank*, 31 Calif. 2d 378, 89 Pac. 2d 10, applies to cases cited by appellee under this point.

Further, in the Zaring case, rent had been collected on real property by the guardian, and had become a part of the corpus of the fund held by him for the joint tenants. It was held that the right of survivorship existed, and the entire fund passed to the surviving tenant. This case in no manner touches the question that dividends declared, and set aside, will pass by survivorship to the surviving joint tenant.

The defendant points out that rent due on property does not pass to the purchaser of the property. This is

true. It is also true that all rent due and unpaid on property held in joint tenancy does not pass to the surviving joint tenant. Certainly there is nothing in the Zaring case to indicate that due and unpaid rental on property held in joint tenancy passes by survivorship.

However, regardless of how rents on joint tenancy property may be treated, no case has been cited that holds that the right of survivorship attaches to dividends declared, and not paid prior to the death of the joint tenant. Can it be conceived that the right of survivorship, which must always exist in a joint tenancy, can pass to the survivor of jointly owned stock, the declared but unpaid dividends, when the sale of the stock by its owner cannot and does not do so?

#### IV.

**The dividends and stock rights when set aside constituted a special deposit in the hands of defendant for the benefit of the plaintiff.**

The nature of the deposit within which the fund in question falls is clearly indicated as being a "special deposit," both by the authorities and statutes cited at pages 52 to 58 of Appellant's Brief.

No authorities to the contrary are cited by defendant. That the fund in question was a payment to the corporation for the use of the stockholder brings it within the meaning of a special deposit, as defined and analyzed by said authorities.

#### V.

**Plaintiff is entitled to interest from the date each dividend was declared, and not from the date of demand.**

Defendant has at all times up to and including the present time denied "that said dividends or stock rights or either of them were or are owing to the plaintiff" (T. R. p. 22). Even after plaintiff's ownership was established in the Kansas case, defendant's position remained unaltered. The demand for payment on October 15, 1945, was



rejected. Can it be conceived that an earlier demand by plaintiff for payment of dividends on stock that defendant had transferred on its books to another under the "belief" that plaintiff had "by properly executed documents" vested the other with "exclusive right to payment" would have resulted in compliance with such a demand?

The futility and impossibility of an earlier demand is shown, by the record, in this case in a manner that is unique. It would be extremely difficult, if not impossible to duplicate it, or state a set of facts which would indicate more conclusively the futility of making an earlier demand than is established in this case.

In this connection defendant points to the fact that dividends were paid to Mrs. Price only up to March 20, 1944 (Appellee's Brief, p. 22). This is not correct. Payments were made to Price up to December 27, 1943, the date of her death (T. R. pp. 45, 53). Immediately following the death of Mrs. Price, George E. Burton, her son, claimed the entire ownership of the 575 shares of stock. It was then that plaintiff learned for the first time of the fraud that had been perpetrated against him by his grandmother and her son, and litigation promptly resulted between Burton and Hurley.

## VI.

### **Conclusion of Law XI (T. R. p. 62) is erroneous.**

1. The record clearly discloses that payments were made to Price during plaintiff's minority.
2. Validity of the forged powers of attorney and dividend orders, and not ratification of joint tenancy in the stock certificates, is involved herein.
3. Calif. Civil Code, Sec. 33, prevents Section 1475 of the Civil Code from applying against a minor.

The plaintiff was born December 18, 1908. Plaintiff was therefore 20 years of age in January, 1929, when the forged forms of assignment, including powers of attorney, were received by defendant in Los Angeles on January 22,

1929. Plaintiff was 19 years of age when the void dividend orders were received by defendant on December 11, 1928, Finding VI (T. R. p. 37).

Dividends on stock in defendant company were paid quarterly (T. R. p. 43). Payment on said dividend orders was begun December 11, 1928, and continued to December 27, 1943, Finding XX (T. R. pp. 53, 45). Stock rights represented by warrants issued in the name of the stockholder were created by resolution January 25, 1929, to be delivered "on or before April 22, 1929." Finding XXVIII (T. R. p. 57).

It thus clearly appears that payment of dividends and delivery of stock rights under the void assignments and dividend orders were made to Price during the minority of plaintiff. The fact that plaintiff reached his majority December 18, 1929, can be of no importance as far as the question here involved is concerned.

The fact that plaintiff was a minor at the time the void assignments and dividend orders were secured and acted upon, both as to dividends and the delivery of warrants constituted a fraud upon plaintiff. Since defendant was bound to know under the California law that plaintiff was a minor at the time it received and acted upon said void documents, it was charged with knowledge of the fraud so perpetrated.

It is likewise true that this knowledge would be charged to the defendant, regardless of whether the documents were void or merely voidable. To act under them in either event would be to act with knowledge of their illegality and with an understanding that they were subject to disaffirmance, which did occur within a reasonable time after plaintiff reached his majority (T. R. p. 47).

It is therefore unimportant as to whether or not all payments by and under which plaintiff was defrauded occurred during his minority, or afterwards, as it is not the time when payments were made on the void documents that renders Section 1475 of the Civil Code inapplicable, and removed defendant from all protection of said statute, but it is the knowledge of the fraud perpetrated against

the minor plaintiff that destroys the application of Section 1475.

The knowledge of the illegality with which "documents" were tainted because of plaintiff's minority would not evaporate, be wiped out, or cease to exist, when plaintiff became of age. The knowledge with which defendant was charged as to plaintiff's minority, which prevented Section 1475 from operating prior to the day plaintiff reached 21, would be just as effective to prevent exoneration and protection of the defendant under Section 1475 afterwards, as it was before. The exoneration under Section 1475, on which defendant now relies, could exist in no event unless defendant acted without knowledge, actual or constructive, of the perpetration of fraud against the plaintiff. Since plaintiff was charged with knowledge of the illegality and fraud being perpetrated at the time the void documents were received, and payments made, this knowledge would of necessity remain and continue throughout the entire transaction.

There is not now, and there has never been an issue in this case as to the form of ownership of the shares of stock, as defendant attempts to indicate. The form of ownership of the stock which is not involved herein, and the ownership of the dividends and stock rights are separate and distinct. There is no question in the case as to the ratification of the dividend orders and the forged assignments by which an attempt was made to transfer the dividends and stock rights to Price. The record discloses that no action of ratification pertaining to the void "documents" occurred, but that all action was directed toward disaffirmance.

The attempt to distinguish the case of *Perkins v. Benquet Consolidated Mining Co.*, 55 Cal. App. 2d 720, 132 Pac. 2d 70, on the ground that in the case at bar, defendant was without knowledge of Price's claim, is without merit. Defendant knew as a matter of law when the forged and spurious powers of attorney were presented to it for action, that an effort was being made by Price to eliminate all plaintiff's interest illegally. Price was acting under illegal

“documents” as defendant well knew by reason of plaintiff’s minority.

Defendant’s effort to avoid the finding of the lower court that the Kansas judgment was *res judicata* ignores the fact that such finding and judgment is conclusive, as no cross appeal was taken therefrom. In this connection defendant has also overlooked or disregarded the fact that the trial court found specifically all the fraud, deceit, concealment, misrepresentation, lack of consideration, and minority of the plaintiff, that was found by the Kansas court. These findings as effectively invalidate the “documents” as those made in the Kansas court, and constitute a confirmation thereof.

It clearly follows that the same result should flow from these findings in this court as flowed from them in the Kansas court, namely, “the entire transaction was so tainted with deception practiced upon the defendant (Hurley) by his grandmother and his uncle, that the transfer of the 575 shares of stock cannot be approved by the court, and thus become effective” (T. R. p. 8).

The court will also note that the lower court in addition to finding the Kansas judgment *res adjudicata* (T. R. p. 58), also found said assignments of the 575 shares to be forgeries and “not properly indorsed.” Finding XVI (T. R. p. 49, Exhibit D, incorporated by reference, page 87). It follows that *res judicata* has become a moot question. However the conclusion of the trial court is well supported by the authorities.

The cases cited by defendant under this point dealing with actions barred by statutes of limitations have such a remote relation to the point involved herein that analyzation is considered unwarranted.

## DIVISION TWO.

### I.

**Conclusions of Law V, VI, VII, VIII and IX are correct.**

The separation of defendant's brief into two divisions is significant. In the first division defendant attempts to establish its latest defense, namely, that it discharge its obligation to Hurley by payment to Price as a joint tenant of Hurley. In the second division it reverts to its pleaded defense, namely, that Price was the entire owner of the fund in question by reason of valid and binding assignments and dividend orders that made Price the successor to Hurley's entire interest.

It follows that if the position taken in Division Two is correct, then at no time involved herein was plaintiff a joint tenant of Price in the dividends and stock rights. If on the other hand the position taken in Division One is correct, then none of the "documents" relied on in Division Two were valid and binding on plaintiff.

It is also significant that in Division Two defendant departs from the position taken in Division One (Appellee's Brief, p. 6) that the findings of the trial court are conclusive since the transcript of the evidence is not before the court. It urges, nevertheless, that the trial court erred in finding that plaintiff was entitled to 1/3 of dividends and stock rights (Findings XIII and XXII, T. R. pp. 45, 54) and that plaintiff disaffirmed the dividend order and assignments within a reasonable time. Finding of Fact XXVI (T. R. p. 56). This is the second court that has so found (T. R. p. 88).

Plaintiff had a reasonable time after reaching his majority to disaffirm. As decided in *Ralph v. Ball*, 100 Kan. 460, "reasonable time is one of fact." The time has been



fixed by statute "not by counted years but reasonableness under all the circumstances."

It has been pointed out above that Dividend Order No. 12743 was an attempted delegation of power by a minor void under Section 33 of the California Civil Code, and needed no disaffirmance. This order shows on its face that its object and purpose was to confer power on the defendant to make payment to a party not otherwise authorized to receive payment, and was subject to revocation by the plaintiff at any time. It would be a strange contract or assignment that would be subject to instant cancellation or repudiation. This order shows that it had nothing to do with "manner of transmission," as defendant suggests.

The case of *Haynes v. Thomas G. Slack*, 32 Miss. 193, is directly in point. In this case Thos. G. Slack was a minor of the age of 20 years, and entitled to his distributive share of his father's estate. The estate was sold, and the money ordered distributed among the heirs. Thos. G. Slack assigned his share in the estate to one Arrington, but payment of the fund to Arrington was denied. The court held:

"The heir must have legal capacity to execute the proper acquittance to the administrator before he can insist upon payment of his share of the money. Thos. G. Slack having no power to execute an acquittance, which would bind him, could not by the transfer invest his assignee Arrington with such power."

*Swanburg v. Fossen*, 43 L. R. A. 427, 433; 43 C. J. S., p. 130, Sec. 53; *Fuqua v. Sholem*, 60 Ill. App. 140; 31 C. J. 1002. The record discloses that Dividend Order 12743 is not only void as a delegation of power, but has now twice been found illegal and void by *reason* of fraud and deceit practiced in its procurement. Finding XIV (T. R. pp. 46-47), Conclusion VII (T. R. p. 61).

It will be noted that the defendant has failed to point out whether the "assignments and irrevocable powers of attorney" under which plaintiff's stock was transferred on defendant's books, constituted attempted delegation of power or not (T. R. p. 89).

In this connection it will likewise be noted that only a small part of the funds involved herein are claimed to have been paid by defendant under Dividend Order 12743. Finding XX (p. 53). All other payments were made under Dividend Order 13157, which was not signed by plaintiff. Finding XII (T. R. p. 45). The defendant has failed to disclose under what authority from the plaintiff defendant claims to have made the payments under Dividend Order 13157.

The case of *Bank of Guntersville v. U. S. Fidelity, etc., Co.*, 201 Ala. 19, 75 So. 168, is cited as holding that payment to one of several joint obligees is payment to all, though some are minors.

This case did not involve payment to a minor, as payment was made to the minor's guardian. The language used is clearly *obiter dictum*. Further there is no showing in the case that such a statute as Section 33, California Civil Code, exists in Alabama. The facts indicate also that no "void documents" executed by a minor were involved. Thus no knowledge of the illegality and fraud that was being perpetrated against the minor could be charged against the obligor as in the case at bar, which, in and of itself, eliminates the exoneration claimed under Section 1475 of the Civil Code.

Now as to the statute of limitations, the law is well settled, that concealment of facts on which the cause of action is based, stops the running of the statute of limitations. In the case at bar knowledge of the fraud involved, both actual and constructive, on the part of the defend-



ant has been specifically found by the trial court, as well as actual concealment of information, provided and required to be given to the plaintiff by defendant on resolutions and otherwise. Finding of Fact XXVIII (T. R. p. 57), Finding XVI (T. R. p. 49 and Exhibit D, p. 87).

On the record the statute of limitations can have no application, as shown by the authorities.

*Hansen v. Bear Film Co.*, 28 A. C. 173, 1. c. 197.

*Calistoga Nat'l v. Calistoga Vineyard*, 7 Cal. App. 2d 65, 72, 46 Pac. 2d 246.

*Wells v. Green Bay Co.*, 90 Wisc. 1. c. 453.

*Miles v. Bank of America, etc.*, 17 Cal. App. 2d 397-8, 62 Pac. 2d 177.

*McDermot v. Hays*, 175 Cal. 95, 114, 118, 70 Pac. 616.

*Neff v. New York Life Ins. Co.*, (April 26, 1946)  
74 A. C. A. 208, 215.

### CONCLUSION.

Defendant seems to concede that the controlling question on this appeal is the applicability of Section 1475 of the California Civil Code. This position harmonizes with the finding by the lower court that if Section 1475, Civil Code, is not applicable, plaintiff is entitled to judgment. Conclusion XII (T. R. p. 63).

Therefore, judgment for the plaintiff logically follows since the inapplicability of Section 1475, Civil Code is established by the specific findings of the lower court that charged defendant with knowledge, actual or constructive, of the fraud perpetrated against the minor plaintiff which includes action by defendant on altered "assignments and irrevocable powers of attorney"; forgery; action on assignments not properly indorsed; dividend orders procured by fraud and deceit that were void

as attempted delegations of power by a minor; violation of defendant's own resolutions in failing to issue and deliver stock warrants to plaintiff, and the fraud of excluding plaintiff from all benefits with full knowledge of the intended exclusion.

Further, since Section 1475, Civil Code, was not pleaded as a defense, and the dividends involved were never held in joint tenancy, but constituted a special deposit within the meaning of Section 1475, Civil Code and Section 33 of the Civil Code prevents Section 1475 applying to minors, plaintiff is entitled to recover all dividends and stock rights, with interest thereon from date each dividend was declared, and set aside for payment.

Respectfully submitted,

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